I welcome the opportunity, as part of the open access republication of *Keeping the People’s Liberties*, to reflect on the book’s claims and contributions in light of developments during the past two decades.

The book’s principal argument is that safeguarding individual rights is not the sole province of judges. The dominant expectation at the present time is that advances in rights protection come through U.S. Supreme Court decisions and occasionally from state supreme court rulings. Individuals and groups seeking expansion of rights focus much of their energy on securing the appointment of judges who are favorably disposed to their causes; then they concentrate on filing lawsuits with an eye to generating rights-protective court decisions. Certainly, this is the current understanding of how advances in rights are secured. However, a historical investigation of rights protection in the United States, such as the one undertaken in *Keeping the People’s Liberties*, demonstrates that this court-centric approach has not always been the dominant one. Legislators and citizens have also played important roles in securing rights: legislative statutes and constitutional amendments have protected rights at both the federal and state levels. Meanwhile, in states that allow direct democracy, citizen-initiated measures have also been vehicles for securing rights.

This book also seeks to assess the relative effectiveness of judges, legislators, and citizens as guardians of rights. Scholars have engaged in long-standing debates about the comparative virtues of courts, legislatures, and direct democratic institutions as forums for deliberating about rights. A number of scholars have, on a regular basis, made the case that rights protection is best entrusted to courts. A smaller group of scholars has advanced arguments in favor of political constitutionalism or popular constitutionalism, whereby the protection of rights and constitutional principles is best entrusted to legislators and citizens. However, relatively little work has been done to examine the empirical record and draw lessons about the actual performance of each of these various institutions as guard-
ians of rights. In this book I undertake such an empirical investigation, focusing on the record of rights protection in individual states.

Analyzing rights protection in several representative states from the late-eighteenth century through the late-twentieth century has several benefits. For much of U.S. history, lasting well into the twentieth century, most of the guarantees of the federal Bill of Rights were not understood as restraining state governments. As a result, state governments were primarily responsible for defining and securing civil liberties during this time. Even after the U.S. Supreme Court “incorporated” nearly all provisions of the federal Bill of Rights via the Fourteenth Amendment, states can still recognize rights not protected at the federal level and provide higher levels of protection for rights that are guaranteed by the federal Bill of Rights. In undertaking an empirical analysis of rights protection throughout U.S. history, it therefore makes sense to pay particular attention to the states. Another benefit of examining the record of rights protection at the state level is that nearly half of the states allow citizens to initiate statutes or constitutional amendments; these direct democratic devices have no counterpart at the federal level. Examining rights protection in the states therefore permits analysis of the performance of citizens acting through direct democratic institutions, legislators acting via passage of statutes, and judges acting through issuance of rulings.

Keeping the People’s Liberties concludes that judicial, legislative, and direct democratic institutions each have strengths and weaknesses as engines of rights protection. Courts have taken the lead in expanding protection for rights under certain conditions and in certain respects. At other times legislatures have been chiefly responsible for advances in rights protection. In still other cases direct democratic institutions have been a vehicle for recognizing rights in advance of or to a greater degree than has been attained in other forums.

* * *

Developments since the book’s publication demonstrate the continuing importance of state governments as forums for rights protection. Recent developments also highlight the key roles played by legislative statutes and citizen-initiated measures in expanding rights. In some recent instances, to be sure, judges have taken the lead in securing advances in rights, as with the recognition of a right to same-sex marriage. Even in several recent prototypical cases of court-driven change, however, legislative statutes and citizen-initiated measures have played an important role. In still other cases legislators and citizens have taken the lead role in expanding protection for rights. These and other developments illustrate the benefit of viewing rights protection as the province of legislators and citizens as well as judges.

Consider one of the leading cases of the expansion of rights in the twenty-first century: the movement to secure legal recognition of a right to same-sex marriage. State supreme courts were the pioneers in legalizing same-sex marriage,
beginning with a Massachusetts Supreme Court ruling in 2003. A half-decade later, several other state supreme courts began issuing decisions recognizing a right to same-sex marriage, or, alternatively, same-sex civil unions. Then, in 2014, federal district courts began issuing decisions on a regular basis requiring recognition of same-sex marriage in a number of states. Finally, in Obergefell v. Hodges (2015) the U.S. Supreme Court recognized a right to same-sex marriage on a nationwide basis.

Although discussions of the legalization of same-sex marriage in the United States tend to focus on these judicial rulings, these standard accounts leave out the important role played by state legislatures and direct democratic institutions. By the time the U.S. Supreme Court in Obergefell required legal recognition of same-sex marriage throughout the country, a majority of states had already legalized same-sex marriage, with legalization in eleven of these states achieved not on account of state or federal court rulings but rather through passage of legislative statutes or citizen-initiated measures. In ten states same-sex marriage legalization was accomplished through legislative statutes: in Vermont and New Hampshire in 2009; New York in 2011; Maryland and Washington in 2012; Delaware, Hawaii, Minnesota, and Rhode Island in 2013; and Illinois in 2014. Meanwhile, Maine in 2012 legalized same-sex marriage through a citizen-initiated statute.

The judicial role in some other recent high-profile instances of expanded rights protection is even more attenuated and the role of legislators and citizens even more prominent. Consider efforts in the twenty-first century to prevent governments from invoking the eminent domain power to condemn private property and use the land for economic-development purposes. State and local governments have long relied on eminent domain to build roads, airports, and similar transportation projects, but a key question in recent decades has been whether eminent domain can be used to build shopping malls, office complexes, and other economic-development projects. When the U.S. Supreme Court considered this question in a 2005 case, Kelo v. City of New London, Connecticut, a majority of the justices declined to recognize a federal constitutional right that would bar the use of eminent domain for economic-development purposes.

Rather than bringing an end to the battle over limiting the eminent domain power, the Kelo decision had the opposite effect. The adverse ruling prompted groups seeking greater protection for property rights to focus their efforts at the state level. Some of these groups shifted their focus from federal courts to state courts and, in a few cases, secured favorable state supreme court rulings limiting the use of eminent domain for economic-development purposes. For the most part groups sought and gained relief from state legislatures and through direct democratic institutions. More than forty states revised their eminent domain laws in the decade following the 2005 Kelo decision, largely with an eye to providing state-level protection for property rights that the U.S. Supreme Court declined to guarantee. Many state legislatures revised their statutes or began the process of amending constitutional provisions to limit or outright bar the use of eminent
domain for economic-development purposes. In a few instances when groups thought that state legislatures did not act quickly enough or provide sufficient protection for property rights, they turned to the citizen-initiative process to make changes in eminent domain laws or constitutional provisions.

In still other areas, groups seeking expanded protection for rights have focused primarily on securing relief from state legislatures and have not focused as much on courts. In recent years, for instance, several state legislatures, most notably California, have taken the lead in passing laws protecting digital privacy. These state laws limit the way businesses or other entities can collect, store, or share individuals’ electronic data and information. Several other state legislatures, such as those in Missouri and New Hampshire, have crafted and secured voter approval for constitutional amendments guaranteeing privacy of individuals’ personal information more broadly.

These and other developments serve as a reminder that legislators, citizens, and judges have a role to play in protecting rights. Moreover, as several of these twenty-first-century cases make clear, legislators and citizens are in some cases more effective than judges in securing rights, in the sense that they can act more quickly to expand certain rights, provide greater levels of protection for other rights, and serve as the primary engine of protection for some rights claims.

John Dinan
Winston-Salem, NC
August 2019